LIM MENG HUAT

v.

PUBLIC PROSECUTOR

COURT OF CRIMINAL APPEAL, SINGAPORE
WEE CHONG JIN CJ
TS SINNATHURAY J
FA CHUA J
[CRIMINAL APPEAL NO. 3 OF 1980]
27 APRIL 1982

CRIMINAL PROCEDURE: *Murder witness not called at preliminary inquiry - Notice to call witness at the trial Court given - Witness recalled as an expert witness - Whether occasioned a failure of justice - Section 187(3) Criminal Procedure Code - Section 138(4) Evidence Act (Cap. 5).*

On the night of 21 January 1978 a group of people were drinking beer in a stall at Boon Lay Garden food centre in Jurong. The only girl in the group named Alice was the centre of attraction. Late in the night a police constable who was on duty approached the table and invited her to go out with him later. She refused even though one of the group members Seow Peng persuaded her to go out with the police constable. Alice rebuked Seow and there was an exchange of words between the two of them. At this time another member of the group Penang Seng armed himself with a broken bottle, shouted angrily at Alice to shut up. Whilst order was being restored the deceased was heard to say to Penang Seng that he should not have behaved towards Alice in that manner. Soon everyone was pacified and they were all drinking again.

At the same time a friend of Alice who was seated at the next stall, was seen going through a corridor to the rear portion of the food centre. He returned shortly with a long object wrapped in a paper and charged at the group stabbing the deceased and one Lim who was seated next to the deceased. Thereupon the others left the table.

The deceased was then taken to the General Hospital in a very serious condition where he died about half an hour later. The appellant was tried and convicted by the High Court on a charge of murder, basing mainly on the evidence given by 2 doctors. The only defence at the trial was that the appellant was so drunk that he did not know what had happened. The trial Judge rejected his defence that he did not cause the injury to the deceased and found that the appellant was not drunk and knew what he was doing. He had intentionally inflicted the stab wound on the deceased and that was sufficient in the ordinary course of nature to cause the death of the deceased and therefore found him guilty of murder. The appellant appealed.

The appellant was granted leave to file a supplemental petition of appeal at the hearing wherein he challenged the findings of the trial Judges who appeared to have based their decision on the evidence of DR. Chng Hong Chee, an expert witness called by the prosecution in compliance with the mandatory provision of s.187(3) of Criminal Procedure Code, as he had not given evidence in the preliminary inquiry. However the question that remains for consideration was whether the second round of the evidence of Dr. Chng was in breach of s. 187(3) of the Criminal Procedure Code.

Held:

[1] There is nothing in s. 187(3) of the Code that requires that in such a circumstances a fresh notice has to be given to a witness who has already given evidence in the trial. To permit a witness to be recalled and the admission of his evidence are matters eminently for the trial Judges.

[2] The trial Judges had relied not on the evidence of Dr. Chng but on the expert evidence of the forensic pathologist, Dr. Wee Keng Poh, that the fatal stab wound inflicted by the appellant on the deceased was sufficient in the ordinary course of nature to cause his death. On this assumption the appellate Court is satisfied that it has not occasioned a failure in justice.

[Appeal dismissed.]

Cases referred to:
The Public Prosecutor v. Oie Hee Koi [1968] AC 829
Reg. v. Warn [1970] AC 394

Legislation referred to:
Criminal Procedure Code [Sing], ss. 187(3), 368
Evidence Act [Sing], ss. 138(4), 167
Penal Code [Sing], s. 300(c)

For the appellant - Amarjit Singh
For the respondent - E.C. Foenander

JUDGMENT

The appellant, Lim Meng Huat, was tried and convicted by the High Court on a charge of murder, of causing the death of one Ng Kim Leng. At the conclusion of the hearing before us, we dismissed the appeal against conviction. We now give our reasons.

On the night of 21 January 1978, a group of about seven or eight persons was seated drinking beer and stout at a table in front of stall No. 8 at Boon Lay Garden food centre in Jurong. The drinking had started at about 11 p.m. During the course of the night some persons left the group and others joined in; however, amongst those present almost throughout were the deceased, Lim Kim Seng, Seow Peng, Penang Seng and a girl named Alice. She, it would appear, was the centre of attraction in the group.

Late that night, at about 2.00 a.m. there was an ugly incident known to some of them as Mata Fong who was on radio patrol duty in that area went to the table. He invited Alice to go out with him later that night. Alice refused. Seow Peng intervened and tried to persuade her to change her mind. Alice got annoyed. After Mata Fong had left, she rebuked Seow Peng for asking her to go out with a police constable. There was an acrimonious exchange of words between the two of them. This irritated Penang Seng. He suddenly took an empty beer bottle, broke it on the table, and armed with it, he stood up and angrily told Alice to shut up. Those nearby immediately disarmed Penang Seng. Whilst order was being restored, the deceased was heard to say to Penang Seng that he should not have behaved towards Alice in the manner he had done. Soon everyone was pacified, and they were all drinking again. At about this time, appellant who was a friend of Alice was seen seated at an adjacent table in front of stall No. 7.

About 45 minutes later, the appellant was seen leaving his table. He went through a corridor to the rear portion of the food centre. In a short time, he reappeared. He rushed to the group. He went behind the deceased and stabbed him in the back near the kidney region. He was armed with an object, about a foot long, wrapped in paper. The appellant also stabbed Lim Kim Seng who was seated next to the deceased. Thereupon everyone got up from the table and ran away.

The deceased ran to his flat which was a few blocks away from the food centre. He knocked at the front door. His mother and brother found him seated outside. He was in pain and bleeding from his back. He was carried into the flat. The ambulance was summoned. It was just past 4 a.m.

The ambulance attendant arrived at the flat at about 4.10 a.m. He saw the deceased bleeding profusely, trembling in pain, and having difficulty in breathing. In the ambulance the condition of the deceased worsened. He was gasping for breath. He was given oxygen. When he was taken to the Accident and Emergency Department of Alexandra General Hospital, he was almost unconscious. By now it was 4.30 a.m.

The clinical finding of the medical officer who attended on the deceased is that when she saw the deceased he was in a state of shock. She, and a surgical medical officer, made efforts to resuscitate him. They were unsuccessful. The deceased was pronounced dead at 4.55 a.m. of 22 January.

On 23 January, at about 9.15 a.m., Dr. Wee Keng Poh, a forensic pathologist, performed an autopsy on the deceased. He found a single external injury of a fatal stab wound. It was situated in the right posterior chest wall of the deceased. It had penetrated through the right diaphragm, through the right kidney, and finally it had cut into the right psoas major and crus muscles which are muscles in the back of the body. The depth of the wound was about 12½ cm. Dr. Wee said that the wound was caused by a knife that had a sharp single edge. He said that death was caused directly as a result of excessive bleeding from this stab wound. According to him death had occurred within two hours of the stabbing. In the opinion of Dr. Wee the stab wound of the deceased was sufficient in the ordinary course of nature to result in his death.

When the appellant gave evidence on his own behalf, he could not seriously challenge the facts given for the prosecution. He said that at the time of the tragic incident he was so drunk that he did not know what had happened. The trial Judges rejected his defence that he did not cause the injury to the deceased. They found that the appellant was not drunk and that he knew exactly what he was doing when he stabbed the deceased. On the real issue, whether the appellant had committed the offence of murder, the trial Judges found that the appellant had intentionally inflicted the stab wound on the deceased and that the stab wound was sufficient in the ordinary course of nature to cause the death of the deceased. They found the appellant guilty of murder under para. (c) of s. 300 of the Penal Code (Cap. 103).

At the hearing before us, we granted the appellant leave to file a supplemental petition of appeal. In it he challenged the finding of the trial Judges that the stab wound was sufficient in the ordinary course of nature to cause the death of the deceased on the ground that -

> it appears to have been based on the evidence of Dr Chng Hong Chee, an expert witness called by the prosecution ... not in compliance with the mandatory provisions of s. 187(3) of the Reprint of the Criminal Procedure Code...

and was therefore "improperly admitted, unlawful and gravely prejudicial" to the appellant. This was the only ground on which submission was made to us.

We therefore now have to consider how it came about that Dr Chng Hong Chee (Dr Chng) was called to give evidence, the issue taken on appeal on the admissibility of his evidence, and finally what weight, if any, the trial Judges attached to his evidence.

Dr Chng is the consultant surgeon at the Alexandra General Hospital. He was not a witness at the preliminary inquiry. Two days before the trial in the High Court, on 2 February 1980, the learned DPP gave notice to the Registrar of the Supreme Court and to the then counsel for the appellant of the intention to call Dr Chng. The notice was given under s. 187(3) of the Criminal Procedure Code referred to above, which reads as follows:

> A person who has not given evidence at a preliminary inquiry shall not be called as a witness by the prosecution at any trial before the verdict is given, unless the accused person or his advocate and the Registrar have been previously served with a notice in writing of the intention to call such person stating the person's name and address and the substance of the evidence intended to be given.

In substance the notice said that Dr Chng would confirm that Lim Kim Seng (the other person who had been stabbed by the appellant) was medically examined and treated by Dr Yeap Choong Lieng (Dr Yeap) on 22 January 1978 after a minor operation was performed on him and that a medical report on him was subsequently put up by Dr Yeap on 23 March 1978. So, at this point of time, Dr Chng was called as a witness because Dr Yeap was not available to give evidence at the trial as he was away in England on post graduate studies. Dr Chng gave evidence on the first day of the trial, on 4 February 1980, in accordance with the aforesaid notice.

Then, at the commencement of the continued hearing on 7 February 1980, the learned DPP made an application to the Court, and what he said is to be found at p. 222 of the transcript of the trial.

> DPP: My Lords, my learned friend had made an application to recall Dr Tay Woo Kheng. She is present in Court, my Lord, this morning ... To further assist the Court I have taken the liberty of informing Dr Chng Hong Chee to be present in Court this morning and to recall him so that he may further assist the Court by having before him the clinical findings of Dr Tay as well as having the opportunity of going through the autopsy report and to give his assessment of how serious is the injury on the deceased and whether or not it is possible for the deceased to survive the stab wound ... I have spoken to my learned friend that I have to assist the Court in this respect.

We gather from the record of proceedings that the learned DPP took the course of action he did because the medical records of the deceased made by the medical officer, Dr Tay Woo Kheng (Dr Tay), who had attended on the deceased at the Accident and Emergency Department at 4.15 a.m. had been misplaced and could not be found.

When Dr Tay was recalled, she expanded on her earlier evidence that when she first saw the deceased he was in a state of severe shock. He was pale, gasping, and his extremities were cold. The volume of his pulse was low, and his blood pressure was unrecordable. She was unable to set up a drip because all the veins of the deceased were collapsed. Together with Dr Yeap (the surgical medical officer who was away in England during the trial) a cut was made at the left medial ankle of the deceased to locate a vein. About the time the drip was inserted, the deceased lapsed into unconsciousness. The efforts to resuscitate him were unsuccessful. He died within 25 minutes of his admission into the hospital.

Dr Chng then gave evidence. The submission for the appellant was that the following evidence of Dr Chng should not have been admitted in the trial. Based on the clinical findings of Dr Tay, Dr Chng was of the view that when the deceased was brought into the hospital, he had

already collapsed and was in a state of haemorrhagic shock. In the condition the deceased was, he could not be operated. He had to be first resuscitated. Dr Chng was of the view that the deceased was brought to the hospital too late for him to be resuscitated. Dr Chng reiterated the finding made by Dr Wee in the autopsy report that the deceased had suffered a very serious injury, and that the injury was certainly sufficient in the ordinary course of nature to cause his death.

On these facts relating to the evidence of Dr Chng, firstly, it is clear that at the trial Dr Chng was not called as an ordinary witness to give evidence of facts. He came forward to assist the Court as an expert witness. On the first occasion he explained to the Court the medical records made by Dr. Yeap. He elaborated on the injury found on Lim Kim Seng, the surgery that was performed on him and the medical treatment given to him. Dr Chng was called because Dr Yeap was not available to give evidence at the trial.

Secondly, it is also clear that at the commencement of the trial the learned DPP could not have anticipated that the expert evidence of Dr Chng would be required touching on the deceased. It was only when he was told that the medical records of the deceased could not be found that he decided to recall Dr Chng to assist the Court in the matter. Dr Chng had to sit in Court and listen to the evidence of Dr Tay before he could give his expert views on the clinical findings made by Dr Tay of the deceased.

Thirdly, it is also clear that at the trial, the then counsel for the appellant was given notice of the application to recall Dr Chng and told of the purpose of it. No objection was raised on behalf of the appellant. It is to be inferred that Counsel was satisfied that the recall would serve the interests of justice. The recall of a witness, however, is always in the discretion of the Court: see s. 138(4) of the Evidence Act (Cap 5) which provides -

> The Court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.

Moreover, the admission of evidence of a witness who is recalled is also in the discretion of the Court. We note that it was not submitted for the appellant that the trial Judges had in any way erred as regards the exercise of their discretion in permitting the recall of Dr Chng or in the admission of his evidence in the trial.

The question that remains for consideration is whether the second round of the evidence of Dr Chng was in breach of s. 187(3) of the Criminal Procedure Code (the Code).

Counsel for the appellant relied on two lines of cases in support of his submission that non-compliance of s. 187(3) of the Code is fatal in this case. The first line of cases related to the obtaining of the consent, say that of the Public Prosecutor, before a prosecution could be launched against a person. It is plain that the obtaining of the consent being the foundation for the prosecution, the failure to obtain it will render the proceedings a nullity: see *The Public Prosecutor v. Oie Hee Koi* [1968] AC 829 and *Reg. v. Warn* [1970] AC 394. The other line of cases related to reports of certain persons, like a chemist's report, or now a scientific officer's report which under s. 368 of the Code may not be used in evidence in a criminal trial unless a copy of it has been delivered to the accused not less than 10 clear days before the commencement of the trial. Here the principles that apply on appeal are these. Where it is found on the record of appeal that without the report the prosecution cannot establish a *prima facie* case, the failure to deliver the report on the accused not less than 10 clear days before the trial will result in the conviction being quashed. On the other hand, the improper admission of the report can have no effect where independently of the evidence admitted,

there was sufficient evidence to justify the conviction: see s. 167 of the Evidence Act (Cap 5): see *Chong Peng v. Public Prosecutor* [1954] 20 MLJ 39 and *Wong Kok Keong v. Regina* [1955] 21 MLJ 13. In our view, on the observations we have made, neither of the two lines of cases is relevant in the consideration of s. 187(3) of the Code.

We accept the submission for the appellant that s. 187(3) of the Code is a mandatory provision. It provides that a person who has not given evidence at a preliminary inquiry cannot be called as a witness by the prosecution in a trial unless the requirements in the provision are complied with. In the present case it cannot be said that Dr Chng was not properly before the Court. As the learned DPP has rightly submitted for the respondent, Dr Chng was already a witness in the trial. The complaint however was that Dr Chng was recalled and had testified on matters relating to the deceased of which notice had not been given under s. 187(3) of the Code. The short answer to that is that there is nothing in s. 187(3) of the Code that requires that in such a circumstances a fresh notice has to be given to the accused or his advocate to recall a witness who has already given evidence. As we had earlier said, to permit a witness to be recalled and the admission of his evidence are matters eminently for the trial judges.

Finally, we would observe that in the oral grounds of decision of the President of the trial Court, the trial Judges had relied not on the evidence of Dr Chng, but on the expert evidence of the forensic pathologist, Dr Wee Keng Poh, that the fatal stab wound inflicted by the appellant on the deceased was sufficient in the ordinary course of nature to cause his death. So, on the assumption that the evidence given by Dr Chng on his recall should not have been admitted at the trial, we are satisfied that it has not occasioned a failure of justice.

For all these reasons, we dismissed the appeal.

Also found at [1982] CLJ 245